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Federal Communications Commission

FCC 98-340

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Comcast Cellular	)	
Communications, Inc.	)	
Petition for Reconsideration	)	
of Number Portability Query	)	CC Docket No. 98-14
Services Order in:	)	
	)	
Ameritech Tariff F.C.C. No. 2	)	
Transmittal No. 1149, as Amended	)	
	)	
Bell Atlantic Tariff F.C.C. No. 1,	)	
Transmittal No. 1041	)	
	)	
Pacific Bell Tariff F.C.C. No. 128,	)	
Transmittal Nos. 1927 and 1973	)	
	)	
Southwestern Bell Tariff F.C.C. No. 73	)	
Transmittal Nos. 2638 and 2694	)	

Memorandum Opinion and Order

Adopted: December 17, 1998

Released: December 17, 1998

By the Commission:

I. Introduction

1. The Commission has before it a Petition for Reconsideration (Petition)<sup>1</sup> filed by Comcast Cellular Communications, Inc. (Comcast) requesting reconsideration of our August 19, 1998 telephone number portability *Query Services Order*.<sup>2</sup> That Order concluded the Commission's investigation of the tariff revisions described in the above captioned transmittals, and allowed Ameritech, Bell Atlantic, Pacific Bell, and Southwestern Bell to continue offering, on an interim basis, their long-term number portability query and database services under the rates and conditions contained in those tariff revisions. Comcast's petition challenges the *Query Services Order* only with respect to Bell Atlantic's tariff revisions. For the reasons discussed below, we deny Comcast's Petition.

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<sup>1</sup> Petition for Reconsideration of Comcast Cellular Communications, Inc., CC Docket No. 98-14 (filed Sept. 18, 1998) (Petition).

<sup>2</sup> *In re* Number Portability Query Services Order, *Order*, CC Docket No. 98-14, 13 FCC Rcd 16117 (1998) (*Query Services Order*).

## II. Background

2. On April 6, 1998, Bell Atlantic filed tariff revisions<sup>3</sup> pertaining to the provision of long-term number portability query and database services.<sup>4</sup> The Common Carrier Bureau concluded that these tariff revisions, as well as those submitted by the other carriers, raised substantial questions of lawfulness, suspended them for one day, and set them for investigation<sup>5</sup> pursuant to section 204 of the Communications Act of 1934, as amended (the Act).<sup>6</sup> In response to the *Designation Order*, on July 1, 1998, Bell Atlantic filed its Direct Case. Comcast filed an Opposition to Bell Atlantic's Direct Case on July 10, 1998.

3. On August 19, 1998, the Commission released its *Query Services Order* concluding the investigation of these tariffs, thereby allowing Bell Atlantic, and the other carriers to offer, on an interim basis, query and database services under the rates and conditions contained in their tariff revisions.<sup>7</sup> In addition, the Commission directed Bell Atlantic, and the other incumbent LECs subject to the Order, to file new tariff revisions regarding the rates and conditions for their long-term number portability query and database services when they file their end-user charges in early 1999.<sup>8</sup>

4. On September 18, 1998, Comcast filed its Petition for Reconsideration. It requested reconsideration of the *Query Services Order* on three grounds. First, Comcast argued that the Commission was required by section 204(a) of the Act to determine whether the rates and conditions contained in the tariff revisions were just and reasonable before allowing them to take effect.<sup>9</sup> Second, Comcast argued

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<sup>3</sup> This Transmittal was later modified by *Bell Atlantic F.C.C. No. 1*, Transmittal No. 1071 (filed Aug. 13, 1998).

<sup>4</sup> *In re Telephone Number Portability, Third Report and Order*, CC Docket No. 95-116, 13 FCC Rcd 11701 (1998) (*Third Report and Order*). Based on the objective of section 251(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(b)(2), of removing a barrier to competition by requiring all local exchange carriers (LECs) "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission," in the *Third Report and Order*, the Commission concluded that incumbent LECs may recover their carrier-specific costs directly related to providing long-term number portability in two federal charges: 1) a monthly number-portability charge to commence no earlier than February 1, 1999, that applies to end users; and 2) a number portability query-service charge, which applies to carriers on whose behalf the LEC performs queries.

<sup>5</sup> *In re Bell Atlantic Tariff F.C.C. No. 1*, Transmittal No. 1041, CCB/CPD 98-25, *Memorandum Opinion and Order*, DA 98-686 (rel. Apr. 9, 1998); *In re Bell Atlantic Revisions to Tariff F.C.C. No. 1*, CCB/CPD 98-47, *Memorandum Opinion and Order*, DA 98-1646 (rel. Aug. 17, 1998) (incorporating subsequent Bell Atlantic revisions into investigation); *In re Number Portability Query Services, Order Designating Issues for Investigation*, CC Docket No. 98-14, 13 FCC Rcd 12063 (1998) (*Designation Order*).

<sup>6</sup> Under section 204(a) of the Act, whenever a new or revised charge is filed with the Commission, the Commission may suspend the operation of such charge and conduct a hearing or investigation concerning the lawfulness of the proposed new or revised charge. 47 U.S.C. § 204(a).

<sup>7</sup> *Query Services Order*, 13 FCC Rcd at 16117.

<sup>8</sup> *Id.* at 16126.

<sup>9</sup> Petition at 6.

that the Commission should have addressed the non-cost issue of whether it was lawful to assess default query charges for calls to non-ported NXXs.<sup>10</sup> Third, Comcast argued that the Commission erred because it should have imposed an accounting order to ensure that accurate accounts are maintained for all amounts received under the subject tariff revisions, in the event the tariff revisions are found to be unlawful.<sup>11</sup> No oppositions or comments were filed in response to Comcast's Petition.<sup>12</sup>

### III. DISCUSSION

#### A. Burden of Proof

5. Section 204(a)(1) of the Act states in relevant part that "[a]t any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier . . . ."<sup>13</sup> Comcast argues that under Section 204(a), the Commission must reach a determination that a carrier has met its burden of proof that a tariff is "just and reasonable" before allowing it to take effect, even on an interim basis.<sup>14</sup> We disagree with Comcast that the Commission was bound by section 204(a) of the Act to reach this determination before allowing an interim tariff to take effect.

6. The Courts have long recognized the Commission's discretion to allow a tariff revision to become effective, on an interim basis, without first determining if the tariff revision is just and reasonable. In *MCI Telecommunications Corp. v. FCC*, the United States Court of Appeals for the District of Columbia Circuit (Court) reviewed petitioner's claim that the Commission had erred in allowing AT&T's WATS tariff revisions to continue in effect without any determination by the Commission that those revisions were "just and reasonable."<sup>15</sup> The Court determined that it was within the Commission's discretion to temporarily defer the determination regarding the reasonableness of the rates.<sup>16</sup>

7. The MCI case presented facts that are similar to those presented here. There, the Commission had concluded that the tariff submitted by a carrier was insufficient to allow the Commission to determine the reasonableness of new charges.<sup>17</sup> Ratemaking proceedings had been initiated which would resolve relevant issues. For this reason, the Commission decided to defer ruling on the lawfulness

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<sup>10</sup> Petition at 4. The NXX is the three-digit code that identifies the switch that serves a particular customer. See AIN PROGRAM, NATIONAL COMMUNICATIONS SYSTEM, LOCAL NUMBER PORTABILITY: AIN AND NS/EP IMPLICATIONS, §§ 2.0-2.5 (July 1996).

<sup>11</sup> Petition at 8-9.

<sup>12</sup> On October 8, 1998, Comcast filed a Reply, noting that no oppositions had been filed challenging its assertions in the Petition for Reconsideration.

<sup>13</sup> 47 U.S.C. § 204(a)(1).

<sup>14</sup> Petition at 6.

<sup>15</sup> See *MCI Telecommunications Corp. v. FCC*, 627 F. 2d 322, 338 (D.C. Cir. 1980).

<sup>16</sup> *Id.* at 337, 340.

<sup>17</sup> *Id.* at 337.

of the tariff.<sup>18</sup> In reviewing the Commission's action, the Court noted that, while any delay occasioned by the ratemaking proceedings should not be unduly long, "a filed tariff, like those here, not found to be either just and reasonable or unjust and unreasonable on the basis of the carrier's supporting evidence at the point of filing can avoid the stigma of unlawfulness, at least for a reasonable time."<sup>19</sup> The Court concluded that "there must be enough movement in the statutory joints to allow for such an exigency, given the enormous complexity of ratemaking . . . ."<sup>20</sup>

8. In the *Query Services Order*, we concluded that the determination as to whether Bell Atlantic's tariff revisions for long-term number portability query and database services were reasonable or lawful, could not be made until we were in a position to determine whether the incumbent LECs had appropriately identified their carrier-specific costs directly relating to number portability.<sup>21</sup> We explained that an essential component of this would come after the Common Carrier Bureau's review of the pleadings in the Bureau's pending cost classification and allocation proceeding, and after the incumbent LECs had filed their end-user charges.<sup>22</sup> We expect the incumbent LECs, including Bell Atlantic, to file their end-user charges in January 1999.<sup>23</sup> Moreover, we directed the incumbent LECs to file new tariff revisions regarding rates, terms, and conditions for the query and database services when they file their end-user charges in January 1999. We anticipate that these filings will allow us to make a determination as to the reasonableness of the rates, terms, and conditions for these services by providing us with sufficient information to make such a determination.<sup>24</sup> Because the reasonableness of the tariff revisions must of necessity be based on all relevant data, we find our decision have been not only proper, but also the most reasonable course available to us under the circumstances.

*B. Non-Cost Issue*

9. Comcast further argues that the *Query Services Order* is deficient because it fails to address a non-cost issue designated in the tariff investigation.<sup>25</sup> Specifically, Comcast argues that it is

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<sup>18</sup> *Id.* at 326.

<sup>19</sup> *Id.* at 338.

<sup>20</sup> *Id.* The Court reasoned that a one to two year time-frame may be reasonable, but found that a ten-year delay was unreasonable and had placed the parties in a position where existing remedies were inadequate.

<sup>21</sup> *Query Services Order*, 13 FCC Rcd at 16123.

<sup>22</sup> *Query Services Order*, 13 FCC Rcd at 16123, 16125. See also *Third Report and Order*, 13 FCC Rcd at 11740, wherein the Commission requested interested parties to file comments on its cost allocation proceeding concerning the portion of joint costs carriers shall treat as carrier-specific costs directly related to providing number portability, to facilitate evaluation of the cost support that carriers will file in their federal tariffs.

<sup>23</sup> *Query Services Order*, 13 FCC Rcd at 16126.

<sup>24</sup> *Id.* at 16124.

<sup>25</sup> Petition at 5.

improper for the Commission to delay its determination of whether assessing default query charges for calls to non-ported NXXs is lawful.<sup>26</sup>

10. Contrary to Comcast's arguments, the treatment of charges for querying calls to non-ported NXXs does involve cost issues. Bell Atlantic alleged in its Direct Case that it is most cost efficient to implement number portability in an organized, orderly way, to do at one time all the translations work to indicate in every switch (including tandems) that a particular NXX is portable in accordance with a schedule developed with the industry.<sup>27</sup> Bell Atlantic argued that because of the short, five-day industry-established time frame<sup>28</sup> in which it must respond to service requests to port a number, it would be very inefficient and unnecessarily costly to delay upgrading switches and network translations until after it receives an order to port the first number in an NXX. Further, Bell Atlantic pointed out, the delay in completing the translations work could lead to service reliability problems.<sup>29</sup> Perhaps more importantly, Bell Atlantic argued that this approach would increase the per-query charge by at least forty percent.<sup>30</sup> As we had insufficient cost information to determine if Bell Atlantic's approach was reasonable, we found it prudent to wait until all of the cost information (both query services and end-user charges) was before us. Indeed, the information available was insufficient to permit us to prescribe a reasonable, interim rate, in lieu of the rate proposed by the carrier. We, therefore, directed the LECs in the *Query Services Order* to file new rates and conditions for their provision of long-term number portability query services at the time they tariff their long term number portability end-user charges in early 1999.<sup>31</sup> At that time, we will be in a better position to make a determination as to the reasonableness of the LECs' rates, terms and conditions for these services.<sup>32</sup>

11. For the reasons discussed in the *Query Services Order*<sup>33</sup> and set forth above we find that our decision not to render a determination as to the reasonableness of the rates, terms and conditions of Bell Atlantic tariff revisions for long-term number portability query and database services until such time as sufficient information is available upon which to base this determination, was proper and reasonable.

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> See Bell Atlantic Direct Case at 7-8.

<sup>28</sup> See NORTH AMERICAN NUMBERING COUNCIL, LOCAL NUMBER PORTABILITY ADMINISTRATION SELECTION WORKING GROUP, LNPA TECHNICAL & OPERATIONAL REQUIREMENTS TASK FORCE REPORT, App. B. (Inter-Service Provider LNP Operations Flows), fig. 9 (April 25, 1997), adopted, *In re* Telephone Number Portability, *Second Report and Order*, CC Docket No. 95-116, 12 FCC Rcd 12281, 12315 (1997).

<sup>29</sup> See Bell Atlantic Direct Case at 7-8.

<sup>30</sup> *Id.*

<sup>31</sup> *Query Services Order*, 13 FCC Rcd at 16124, 16127.

<sup>32</sup> We note that this issue also has been raised in the petitions for reconsideration of the *Third Report and Order*. See Petition for Clarification and/or Reconsideration of the United States Telephone Association, at 2, 4-5. (Jul. 29, 1998).

<sup>33</sup> *Query Services Order*, 13 FCC Rcd at 16123-16124.

*C. Imposition of Accounting Order*

12. Finally, Comcast requests that the Commission clarify that the accounting order established in the Query Services Order is still in effect or, in the alternative, issue a new accounting order to ensure that accurate amounts are refunded to carriers in the event that the tariff revisions are found to be unlawful.<sup>34</sup> We find unpersuasive Comcast's claim that an accounting order is necessary to ensure refunds are accurately calculated in the event that Bell Atlantic's tariff revisions are found to be unreasonable.<sup>35</sup>

13. In the *Query Services Order*, we indicated that the tariff revisions would be in place for a relatively short period of time, as we expected the incumbent LECs to file further revisions no later than January 1999.<sup>36</sup> We reasoned that, in this interim period, if customers felt aggrieved by either the rates, terms, or conditions under which the incumbent LECs, including Bell Atlantic, are currently providing services, they may file complaints pursuant to section 208 of the Act.<sup>37</sup> When we terminated the investigation, the accounting order was also terminated. We cannot, therefore, find that the accounting order is still in effect.

14. The Commission has long recognized that the absence of an accounting order in no way precludes a petitioner from relief should an investigation reveal that a tariff is in violation of the Act.<sup>38</sup> Once a proven violation of the Act has been established, liability under section 206 of the Act<sup>39</sup> attaches and recovery may be had under section 207 of the Act.<sup>40</sup> The refund remedy under section 204(a) of the Act is not the exclusive means under the Act to cure a proven violation thereof.<sup>41</sup> An accounting order is merely a device that requires carriers to keep track of which customers experience rate changes and the extent thereof.<sup>42</sup> An accounting order simplifies the computation of refund liability, but it is not indispensable to a determination of carrier liability or to the Commission's ability to order a carrier to redress violations of the Act.<sup>43</sup> Because we find that Comcast has remedies available to it and will not

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<sup>34</sup> Petition at 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Query Services Order*, 13 FCC Rcd at 16126-16127.

<sup>37</sup> 47 U.S.C. § 208.

<sup>38</sup> *See In re American Television Relay*, Tariff FCC No. 8, 70 FCC 2d 1623 (1978).

<sup>39</sup> 47 U.S.C. § 206.

<sup>40</sup> 47 U.S.C. § 207; *Query Services Order*, 13 FCC Rcd at 16123.

<sup>41</sup> *Id.*

<sup>42</sup> *See In re American Television Relay*, 70 FCC 2d at 1630.

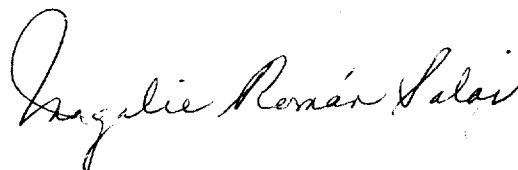
<sup>43</sup> *Id.*

be harmed by the lack of an accounting order in these circumstances, we deny Comcast's request to issue a new accounting order.<sup>44</sup>

#### IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 4(j), 201-205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and 405, that Comcast Cellular Communications, Inc.'s petition for reconsideration is DENIED.

Federal Communications Commission



Magalie Roman Salas  
Secretary

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<sup>44</sup> Furthermore, because of the time lag between the date on which carriers have begun providing query services and the date on which they may tariff their end user charges, leaving the accounting order in place until the lawfulness of the query tariffs could be determined would have required keeping the tariff investigations open longer than the five months allowed for such investigations under 47 U.S.C. § 204(a)(1).